

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

DARRYL COLBERT,)
Plaintiff,)
vs.) Case No. 05-4112-CV-SJ-FJG
GARY B. KEMPKER, et al.,)
Defendants.)

ORDER

Pending before the Court is Defendants Kempker, Kemna, and Richie's Motion to Dismiss for Failure to State a Claim and Failure to Exhaust Administrative Remedies (Doc. No. 22). Notably, plaintiff has not timely served the remaining defendants, Kathleen Baker, Candy Almond, and Mary Carter.

The Court finds that the defendants' motion to dismiss should be granted for failure to exhaust administrative remedies.¹ The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997, requires prisoners to exhaust administrative remedies prior to filing a lawsuit. Here, plaintiff claimed in his prison grievance proceedings that defendants Baker, Carter, and Almond, as well as non-defendant Functional Unit Manager Hollowell, violated certain of his rights. Plaintiff made no claims in his prison grievance proceedings against defendants Kempker, Kemna, or Richie. See Exhibits to Doc. No. 22. The Court agrees with defendants that plaintiff has not yet exhausted his claims against defendants Kempker, Kemna, and Richie. Therefore, defendants' motion to dismiss (Doc. No. 22) is granted, and plaintiffs' claims against defendant Kempker, Kemna, and Richie are **DISMISSED**

¹The Court, therefore, does not reach the merits of defendants' motion to dismiss for failure to state a claim.

WITHOUT PREJUDICE for failure to exhaust administrative remedies.

Furthermore, defendants Kempker, Kemna, and Richie request that the Court dismiss the claims against defendants Baker, Almond, and Carter, for plaintiff's failure to timely serve these defendants.² Plaintiff requests that the Court direct plaintiff to serve these remaining defendants within a specific time, noting that, "Plaintiff's only known whereabouts for these defendants was though [sic] their employment at the Crossroads Correctional facility in Cameron, Missouri. Plaintiff attempted to serve these defendants at that location but was unable to do so. Plaintiff will require assistance from the Missouri Department of Corrections in order to effectuate service." See Doc. No. 25. Plaintiff does not provide the Court with any indication as to when he could accomplish service as to defendants Baker, Almond, and Carter.

The Court notes that this case has been pending for a great length of time. Plaintiff filed a motion for leave to proceed in forma pauperis on April 11, 2005 (Doc. No. 1). Plaintiff was directed to file additional information in support of the motion for leave to proceed in forma pauperis, and after such information was filed, the Court granted provisional leave to proceed in forma pauperis on June 22, 2005 (Doc. No. 5). Plaintiff filed his complaint on June 24, 2005 (see Doc. No. 6), making service of the complaint due by October 24, 2005. Plaintiff did not request any extensions of time for making service until his response to defendants' motion to dismiss, filed on March 21, 2006. See Doc. No. 25. The lack of diligence demonstrated by plaintiff, coupled with the dismissal of all other

²Defendants requested dismissal with prejudice under Fed. R. Civ. P. 4(m); however, as correctly noted by plaintiff, a dismissal under Rule 4(m) should be without prejudice.

defendants, leads the Court to believe that, as to defendants Baker, Almond, and Carter, dismissal pursuant to Fed. R. Civ. P. 4(m), is appropriate. Therefore, the claims against defendants Baker, Almond, and Carter are **DISMISSED WITHOUT PREJUDICE**.

Therefore, for the foregoing reasons:

- (1) Defendants' Motion to Dismiss (Doc. No. 22) is **GRANTED**;
- (2) Plaintiff's claims against defendants Kempker, Kemna, Richie, Almond, Baker, and Carter, are **DISMISSED WITHOUT PREJUDICE**; and
- (3) All remaining pending motions are **DENIED AS MOOT**.

IT IS SO ORDERED.

/s/ FERNANDO J. GAITAN, JR.

Fernando J. Gaitan, Jr.
United States District Judge

Dated: May 8, 2006.
Kansas City, Missouri.